IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA

CENTRAL DIVISION

KENT EVANS,

Plaintiff,

vs.

JO ANNE B. BARNHART[(1)], Commissioner of Social Security,

Defendant.

No. C98-3075-MWB

REPORT AND RECOMMENDATION

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I. INTRODUCTION

The plaintiff Kent Evans ("Evans") appeals the decision by an administrative law judge ("ALJ") denying him Title II disability insurance ("DI") benefits and Title XVI supplemental security income ("SSI") benefits. The ALJ's decision was rendered after an earlier decision by the Commissioner was remanded by this court for additional proceedings because the original hearing tape was inaudible.[(2)] (Doc. No. 6) After a new hearing, the ALJ again denied Evans's applications for benefits. Evans argues that in doing so, the ALJ failed to give sufficient weight to the opinions of his treating physicians, and the ALJ failed to ask a proper hypothetical question of the Vocational Expert ("VE"). (Doc. No. 11)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

Evans filed applications for SSI and DI benefits on April 28, 1995. (R. 30, 137-42) The applications were denied initially on August 8, 1995 (R. 143-45), and on reconsideration on September 6, 1995 (R. 152-54). Evans requested a hearing, which was held on June 11, 1996 (R. 30) ALJ Jean M. Ingrassia issued her opinion on August 25, 1996, denying Evans's claim for benefits. (R. 515-28) The Appeals Council denied Evans's request for review on August 20, 1998 (R. 544-46). The Appeals Council subsequently vacated its decision to consider additional evidence, and again denied Evans's request for review on September 29, 1998 (R. 547-48). Evans filed a timely complaint in this court on November 27, 1998 (Doc. No. 1) The court granted the Commissioner's motion to remand this case for further proceedings because the hearing tape was inaudible, preventing a transcript from being prepared. (Doc. Nos. 3, 6, 7) On June 12, 1999, the Appeals Council vacated its previous decision, and remanded the case for a *de novo* hearing and decision. (R. 553-54)

A new hearing was held on February 23, 2000, before the same ALJ who had decided the case previously. (R. 86-135) Attorney Robert J. Deiter represented Evans, and Evans testified via the Iowa Communications Network. The ALJ called Philip L. Ascheman, Ph.D., and Vocational Expert ("VE") Barbara W. Laughlin to testify at the hearing. (R. 30; 86-135) On May 12, 2000, the ALJ ruled Evans was not under a disability at any time through the date of the decision, and denied Evans's claim for SSI and DI benefits. (R. 42-44) The Appeals Council denied Evans's request for review on February 14, 2001 (R. 7-8), making the ALJ's decision the final decision of the Commissioner. The Commissioner subsequently filed a status report (Doc. No. 8), and an Answer to Evans's complaint (Doc. No. 9), bringing this matter back before the court for consideration.

In accordance with Administrative Order #1447, issued by Chief Judge Mark W. Bennett, this matter has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Evans's claim. Evans filed a brief on June 21, 2001 (Doc. No. 11), and the Commissioner filed a responsive brief on August 17, 2001 (Doc. No. 12). The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Evans's application for benefits.

B. Factual Background1. Introductory facts and Evans's daily activities

Evans alleges he became disabled as of July 1, 1994, due to neck, shoulder, ankle and knee injuries, chronic myofascial pain syndrome, borderline intellectual functioning and a learning disability. (R.

143-45, 152) At the time of the hearing,[(3)] Evans was forty-four years old, and had finished seventh or eighth grade in school.[(4)] (R. 89-90) He had never been married, and was living with his thirty-year-old nephew in Allison, Butler County, Iowa. (R. 91-92)

He had worked last as a chicken "breaker" in the All States Quality Foods poultry plant. Evans stated he broke the wings and legs off chickens as they came through on a conveyor belt. (R. 92-93) He did that job for about three years, and then became a janitor cleaning the restroom at the poultry plant. He also "made sure people washed their hands before they [went] back to work." (R. 93) The janitorial job had less repetitive motion and did not require any significant lifting. He had to clean the toilets, sinks, and mirrors, but did not have to mop the floors. (R. 93-94) Evans said he was at All States from about 1990 to about 1995. (R. 95)

Before the poultry plant, Evans worked for Waterloo Construction as a laborer, where he "ran air hammers and concrete." (R. 94; 95-96) Evans estimated the air hammer weighed between 75 and 100 pounds. (R. 127, 128) In 1984 and 1985, Evans worked for Hopsin Brothers Aluminum, doing janitorial work. He had to lift up to 50 pounds, do cleaning, and empty out garbage cans. (R. 96) At an unspecified time, he also did janitorial work for Free Atlantic Mercury. (*Id.*)

Evans testified he received a worker's compensation settlement of $32,000 in April 1998, all of which went directly to him. He no longer had any of that money, and his nephew was living with him and paying all the bills. (R. 97) Before the worker's compensation settlement, he lived with his parents (R. 92, 97). He had to pay his parents for the money they spent paying the bills. He used part of the worker's compensation settlement for that purpose, and the rest went to the purchase of a house in Allison, Iowa, for $5,000. (R. 98) His nephew came to live with him when the nephew lost his driver's license. Evans transported his nephew back and forth to work. (R. 98-99) Evans's nephew pays the homeowner's insurance and taxes on the house, and buys the groceries. Evans provides him with a place to live and transportation in exchange for the nephew paying all the expenses. (R. 99-100)

Evans does not have medical insurance. When he needs to see a doctor or have a prescription filled, Butler County Assistance pays the bill. (R. 100)

Evans quit working in 1995, due to pain. He said the more he does, the worse the pain becomes, and he gets discouraged and has crying spells. (*Id.*) He takes medication for depression, which Evans said was prescribed by Dr. M.A. Afridi of Cedar Valley Mental Health. (R. 101, 485) At the time of the hearing, he was seeing a counselor at the clinic, Margaret Zander, every three weeks to be treated for depression, and he saw Dr. Afridi every three or four months for medication checks. (R. 106)

Evans said when he tries to work, he has pain in his neck, shoulder, and lower back. He is unable to work for a full eight-hour day, and he has a lifting restriction. (R. 101) He underwent vocational rehabilitation testing for the State of Iowa on two occasions. Once was when he was eighteen years old, and the other was in 1995. On the latter occasion, he stayed in Des Moines and was tested over a period of about a week. (R. 102) Evans's attorney pointed out the testing report says at times, Evans could not sustain work for longer than thirteen to fifteen minutes, and his maximum sitting time without a break was about one hour. Evans said he needed frequent breaks because he could not stand or sit that long without experiencing throbbing pain. (R. 101-102) He said he takes eight Tylenol with codeine capsules every day. (R. 103) He was also taking Remeron (phonetic), amitriptyline, and Zoloft. Evans said the medications are for his depression and pain. They relax him so he can go to sleep. If he does not take the medications, the pain "will get worse and worse." He said he still has pain, even with the medications. (R. 104)

Evans testified he wants to work but has been unable to find gainful employment. He completed the seventh grade, but was held back "[a] few times between seventh and eighth and ninth, and kindergarten." (R. 105) He made Ds and Fs in school. He stated this affects his ability to get a job. (*Id.*) Evans said his shoulder, neck and arm were injured on the job at the poultry plant, from repetitive motion. (*Id.*) The level of his pain increases with activity. (R. 107) He had another appointment set up with vocational rehabilitation, and he testified he has done everything that everyone has suggested to try to get better. (*Id.*)

Evans said he is under a twenty-pound weight limitation, with no lifting above waist level. (R. 107-108) He has never had surgery. (R. 108) Evans and his attorney were unaware that any independent functional capacity assessment had been performed. His attorney stated the worker's compensation award was based on Dr. Afridi's testimony that Evans suffers from major depression, and the report and testimony of Dr. Anthony Alexander, who put Evans on the permanent lifting restriction. (R. 108-109) Dr. Alexander did a nerve conduction study, which the record indicates was normal. (R. 111, 330-31)

Evans stated he has not worked since 1995, because every attempt to work resulted in "so much pain." (R. 112) He was "ran over by a car" in 1988 (R. 94), and broke both his ankles and knee caps.[(5)] (R. 112-113) However, he admitted he worked steadily from 1988 to 1995, and earned his highest wages after 1988. (R. 113) The car accident happened when Evans was working as a "flagger" with a construction crew, holding a flag and making sure traffic went through slowly. A car was going too fast and Evans was unable to get out of the way and was hit. (R. 126) The flag or sign Evans held probably weighed no more than 30 pounds. (R. 128)

Evans said his typical day includes doing a little housework or mowing the yard or raking. He can mow for one-half hour to one hour, and then has to take a break. If the pain is not too bad, he can finish the job later. (R. 115) He also drives his nephew back and forth to work, does grocery shopping, and sits in a recliner trying to relax. (*Id.*)

Although Evans agreed he filed a disability claim because of the overuse injury to his right hand, he said that he had gained weight and now suffered from pain in his neck, shoulder, and lower back. (R. 116)

Because Evans also claimed that his depression precluded him from performing any work activity, the ALJ called Dr. Philip L. Ascheman to testify. Dr. Ascheman had never met Evans, but had reviewed all of Evans's medical records. (R. 116, 122) Dr. Ascheman stated "the difficulty with this case is that this is a case over time." (R. 117) He said Evans had been diagnosed with major depressive disorder and dysthymia in the past, but in his opinion, the major depressive disorder had passed, leaving "an underlying unhappiness which is considered to be dysthymia." (*Id.*) He found some inconsistency between Evans's past history and his current condition at the time of the hearing, stating, "For example, . . . sleep disturbance is present, however, there is a question of whether that is due to pain or choice." (R. 118) He questioned whether Evans was currently having sleep disturbance. (*Id.*)

In summary, Dr. Ascheman found evidence of "psycho motor agitation and retardation through the . . . rocking behaviors and feelings of guilt or worthlessness through indications of low self-esteem. [He] also found evidence of some mild difficulty concentrating or thinking." (R. 119) He agreed Evans also exhibited some of the elements of social phobia. (*Id.*)

Dr. Ascheman then discussed the degree of Evans's limitation as to each of his impairments. He found Evans to be slightly restricted in the activities of daily living; moderately deficient in the areas of

concentration, persistence or pace; and seldom restricted in concentration and attention. He described Evans's pace as slow, and noted one or two episodes of deterioration. (R. 120) Consequently, in Dr. Ascheman's opinion, Evans's impairment does not meet a listed impairment. (*Id.*)

Dr. Ascheman then reviewed a medical assessment of Evans's mental ability to perform work-related activities, prepared by Dr. Mayhew. (*See* R. 622-24) Based on Dr. Ascheman's review of the record, he found Evans to have (a) an unlimited ability to understand, remember, and carry out simple job instructions; (b) a good ability to follow work rules, use judgment, maintain attention and concentration, and relate predictably in social situations; (c) a fair ability to relate to co-workers, deal with the public, function independently; understand, remember, and carry out detailed, but not complex, job instructions; make personal and social adjustments, maintain personal appearance, and behave in an emotionally stable manner; and (d) a poor ability to make performance adjustments; and understand, remember, and carry out complex job instructions. (R. 121-22) He estimated Evans would have a fair ability to demonstrate reliability, depending on how much his pain contributes to reliability as opposed to mental health disorders. (R. 122) The doctor acknowledged he had not specifically looked at pain issues in his analysis (R. 122), limiting his opinion to Evans's mental state and ability to react in the workplace. (R. 124-25)

Dr. Ascheman explained that the diagnoses of major depressive disorder and dysthymia are essentially the same. He indicated Evans's major depressive disorder "may come and go. It only reaches a, a level of major depression from time to time. There is, however, an underlying dysthymia that is a separate disorder." (R. 123) He opined the current diagnosis was dysthymia, as of the time of the hearing. (*Id.*) Dr. Ascheman disagreed with Evans's treating psychiatrist, Dr. Afridi, when the latter stated he doubted Evans's ability to maintain full employment and support himself. (R. 124)

Evans's attorney referred to an incident where Evans was assaulted by co-workers (R. 125), asking Dr. Ascheman what role that incident played in his opinion of Evans's ability to socialize with co-workers. The doctor replied, "I suspect that there has been a long standing difficult for this individual with inter-personal relationships. However, that became a hallmark and initiated some additional reaction that had not been there previously." (*Id.*) The doctor viewed the assault as an isolated incident that would not preclude Evans's ability to work with others. (*Id.*) Dr. Ascheman explained that he also considered the impact of Evans's intellectual functioning, relying on a 1963 test indicating verbal, performance and full scale IQs of 86, 89 and 86, respectively, and a 1995 test indicating scores of 74, 90 and 81, respectively. (R. 125-26)

2. Evans's medical history

A detailed chronology of Evans's medical history is attached to this opinion as Appendix A. The record indicates Evans suffered multiple fractures and trauma to his legs, knees and ankles when he was hit by either a car, or by a machine that was hit by a car, in August 1987. (R. 94, 126, 228) He was treated at the Allen Memorial Hospital and then discharged. He did not seek further medical treatment until September 1989, when he saw a doctor for severe headache pain. Evans was diagnosed with vascular headache, and treated with medications. (R. 344)

In June 1990, Evans sought treatment for periodic pain in his left kneecap arising from the 1987 injury. (R. 344-46) He was treated with medication, which did not alleviate his pain. (R. 346) He was referred to an orthopedist, who found no structural abnormalities, and recommended Evans continue taking

anti-inflammatories, use a heating pad, and perhaps begin some arthritis medication "as the winter months come on." (R. 394-95)

Evans again complained of headache on January 31, 1991, when Dr. R.N. Bremner diagnosed him with a probable vascular headache. Evans was urged to quit smoking and watch his caffeine consumption. (R. 350) He was treated with medications, including Ansaid. On July 1, 1991, Evans called the doctor complaining of headache, and the Ansaid prescription was refilled. (R. 352)

Evans began seeking treatment for right thumb and wrist pain on June 27, 1991. He was diagnosed with work-related tendinitis, "from pulling off wings from the chicken right out of the cooker." (R. 396) He was kept off work for one week, and was to "[d]o breasts next week as a trial." (*Id.*) He was given a prescription for Indocin. (R. 396) Evans returned to the doctor for follow-up on July 1, 1991, and reported he had only taken three of the Indocin because "he wanted to go out drinking over the weekend, so he did not think that the medicine would work." (*Id.*) He was told to start back on his medication and restrict his work to chicken breasts and not wings. (*Id.*)

The following January, Evans again complained of headaches, and his Ansaid prescription was refilled. (R. 352) He next saw a doctor on March 12, 1992, complaining of pain in his right wrist, extending up into his shoulder and neck. The doctor gave him a prescription for Naprosyn, told him to use heat, and restricted his work to deboning chicken breasts. (R. 397) He sought treatment again on June 24, 1992, complaining of pain in his right wrist, extending up to his shoulder and neck. He received a trigger point injection of Xylocaine and Aristospan, in his elbow. Evans had a severe reaction to the injection. His blood pressure dropped and he fainted. After he was stabilized, he was sent home with a cold pack and was told to stay off work the remainder of the week. (*Id.*)

Evans returned to the doctor on June 29, 1992, still complaining of right wrist pain, radiating up into his shoulder. Dr. Bremner diagnosed him with either carpal tunnel syndrome or a tendinitis problem. He encouraged Evans to seek modification of his job duties, or else he would experience continued problems and end up "on some sort of job retraining." (R. 354) Evans's elbow and wrist pain was much improved by the next day, and he was given a prescription for Orudis and told to either change jobs or stay off work for two weeks. (R. 397) He was seen on July 8, 1992, for similar pain, but he refused a trigger point injection. He was told to continue taking Orudis and use heat, and he was released to return to work. (R. 398)

On July 13, 1992, Evans was seen for a consultation with regard to his ongoing right wrist, elbow, upper arm, shoulder, and neck pain. He also reported numbness and tingling in his arms and hands after work, and numbness and tingling in his right hand in the morning. He was diagnosed with a strain of the right cervical trapezius, biceps tendon, elbow, and wrist, and possible carpal tunnel syndrome. (R. 403) He was given a right wrist splint, prescriptions for Naprosyn and Robaxin, and was instructed in shoulder and neck exercises. He was told not to use his right arm at work. He was scheduled for EMG and nerve conduction studies, which were normal. (*Id.*) He was diagnosed with cumulative trauma disorder of the right upper extremity. Evans was continued on Naprosyn and Robaxin, and was referred to daily physical therapy for stretching and strengthening exercises, while continuing his work restriction. (*Id.*)

The physical therapist noted Evans appeared to have some long-term injuries contributing to some crepitus and decreased range of motion of his cervical spine and right upper extremity. (R. 232) Evans exhibited steady improvement during physical therapy, and on August 17, 1992, he was allowed to return to light work with a restriction of no hard squeezing, gripping, pushing, pulling, or lifting over five pounds, and no work above the shoulder level with his right arm. (R. 404)

On August 19, 1992, Evans complained of tingling in his left hand, and pain in his right upper back. The physical therapist assessed Evans as having a probable chronic muscle strain of the right scapula. The onset of Evans's left hand symptoms were thought to be from using his left hand primarily at work while he had been on work restriction as to his right hand. He was also experiencing pain on the left side of his neck. The therapist restricted Evans to working five hours per day, with no hard gripping, squeezing, pushing, pulling, or lifting over five pounds, and no work above shoulder level with his right arm. The therapist noted that if Evans did not improve within one week, he might have to stop work altogether "for a little while." (*Id.*) At his next visit, on August 25, 1992, Evans was taken off work for two weeks. The therapist discussed with Evans the "possibility that this type work is not right for him," and Evans said he was looking for another kind of work. (*Id.*) The next progress note, dated August 28, 1992, indicates Evans was undergoing a work conditioning program which he was tolerating well, and Evans felt he was making progress. (R. 236) He continued to improve, although he still had some pain in the right upper trapezius area. On September 4, 1992, the physical therapist noted Evans was, overall, "at a work level that he could tolerate most any job at All States Food . . . . However, continuous repetitious force would at this time probably enhance a recurrent right upper trap injury as well as perhaps his thumb." (R. 237) On September 8, 1992, Evans was released to return to his regular job. (R. 405)

On March 4, 1993, Evans saw Dr. Bremner, complaining of a fever, cough, and sinus headache. He was diagnosed with maxillary sinusitis and given a prescription for Amoxicillin. (R. 357) Two days later, he was still complaining of headache, and Dr. J.W. Keiser diagnosed Evans with vascular headache. The doctor prescribed Toradol, and continued the Amoxicillin. (R. 356)

The next progress note, on August 4, 1993, indicates Evans had been calling in repeatedly for work excuses due to migraine headaches. He had called in sick on May 18, June 7 and 30, July 28, and August 2 and 4, 1993. The doctor noted Evans was not using "a whole lot of medication for these episodes, but they are going to have to be dealt with more definitively." (R. 358) No further notes are contained in the record regarding treatment for these headaches.

Evans underwent a physical therapy initial evaluation on March 25, 1994. Evans was complaining of severe pain in his right upper extremity, reporting his pain as a "10" on a pain scale of 0-10. The doctor noted Evans had signs and symptoms consistent with overuse syndrome of his right upper extremity, and signs and symptoms of possible right lateral and medial epicondylitis. The doctor questioned Evans's assessment of his pain as a "10," because Evans was able to tolerate moving his right upper extremity and palpation procedures during the evaluation. Evans was scheduled for physical therapy three times per week for pain reduction, active and passive stretching exercises, posture exercises, and progressive resistive exercises to his right upper extremity. (R. 428-30)

On March 31, 1994, Evans reported he was receiving about two hours of relief after his physical therapy treatments, but otherwise there was no real change in his condition. Progress notes indicate Evans's poor sitting posture was delaying improvements in the status of his right arm. His working conditions also appeared to be delaying his recovery. (R. 431) At his next follow-up appointment, on April 7, 1994, Evans rated his right arm pain at "3" on a 0-10 pain scale. He seemed to be receiving little benefit from the physical therapy sessions (R. 432, 433), and he was discharged from physical therapy on April 8, 1994. (R. 433) Discharge notes indicate Evans's posture had improved considerably, but he still had some aspects of bad posture related to his right shoulder region.

On April 20, 1994, Evans saw Dr. Anthony W. Alexander for consultation relating to his ongoing pain. An electrodiagnostic study was normal, with no evidence that Evans had carpal tunnel syndrome or

peripheral neuropathy involving his arms. Dr. Alexander noted Evans's symptoms likely were secondary to overuse syndrome and myofascial pain. (R. 330-31)

Evans was still experiencing right shoulder pain, as well as pain in his feet, when he saw Dr. Bremner on May 19, 1994. Dr. Bremner encouraged Evans to seek assistance from vocational rehabilitation to find a better job. Evans received similar advice from a doctor he saw the next day, on May 20, 1994, for a consultation regarding the pain in his knees and ankles. The doctor recommended Evans find a job where he could sit part of the time. (R. 242)

Evans saw Dr. Bremner again on June 23, 1994, still complaining of pain in his right shoulder, which he stated had been ongoing for three years. The doctor noted the following: "I feel that a lot of it is [Evans's] limited ability to education and gainful employment and yet the fact that he does not have a strong body for physical work. I find no objective abnormality at the present time." (R. 222, 360[(6)]) The doctor noted Evans's lack of financial resources was a problem in getting him treatment, and Evans had been "told by his company that this is not covered by workmans comp." (*Id.*) He prescribed Relafen.[(7)]

Evans saw Dr. Bremner again on July 6, 1994, for pain in his right shoulder and wrist. The doctor advised Evans to obtain vocational rehabilitation counseling, and referred him to the University of Iowa Hospitals and Clinics for an orthopedic evaluation. (R. 222, 360[(8)]) Evans was evaluated at the University of Iowa by Dr. James V. Nepola on August 31, 1994. Dr. Nepola found Evans to have pain of unclear etiology, concluding he had possible ("questionable") nerve impingement versus a myofascial type pain syndrome. Dr. Nepola noted:

The patient refused a nonsteroidal anti-inflammatory agents and refused an injection. It was unclear [ ] exactly what his objectives were in coming here. We encouraged him to accept a prescription and stated he could use this if [he] decided he wanted to at a later date. He will go home and think about the injection and call us on a PRN basis.

(R. 246) Evans returned to see Dr. Nepola on September 27, 1994, and received an injection of Celestone and Lidocaine. (R. 248) Evans received some relief from the trigger point injection for about four days. He received another injection on November 2, 1994, as well as a prescription for Naprosyn. He saw Dr. Nepola for a follow-up on December 14, 1994, with continued tenderness in his trapezius muscle. Evans was encouraged to return to work, given the chronic nature of his problem. Because of the cost, Evans declined a prescription for nonsteroidal anti-inflammatories, and the doctor gave him some samples of Naprosyn. Evans was told to use anti-inflammatories, and do stretching exercises. (R. 250)

On January 21, 1995, Evans underwent psychometric testing for intelligence and academic achievement. He received a score of 81, which placed him in the low average range of intelligence. His strength was in the visual-motor area, in which he scored average on the performance scale. Evans was reluctant to accept recognition of his work and minimized his strengths, saying he was slow to learn and to work. (R. 253-55)

Evans saw Dr. Nepola again on April 25, 1995, still complaining of right upper extremity pain. The doctor told Evans there was no further therapy available, other than as previously recommended; that is, take anti-inflammatories and do physical therapy. Evans was advised he would not do further damage to his shoulder by engaging in moderate manual labor. He was told not to lift over 20 pounds, and only above the waist. He was released to work 40 hours per week, as tolerated. (R. 251)

On July 12, 1995, Evans saw Dr. Daniel Johnson for a consultative examination for the myofascial pain in his right trapezius. (R. 257-59) Dr. Johnson noted Evans

appear[ed] to have had an inadequate treatment of anti-inflammatory medication due to fear of medication and potential reaction. He is presently tolerating his light duty job. He would not qualify for heavier manual labor unless he had further rehabilitation. He would need to be in a specialized program due to his learning disability which would have an impact on the educational process for this young man.

(R. 258)

Dr. Jan Hunter performed a residual physical functional capacity assessment of Evans on July 24, 1995. He found Evans could occasionally lift/carry 20 pounds, frequently lift/carry 10 pounds; stand, walk, and sit about six hours in an eight-hour work day; and push/pull without limitation. Evans had no manipulative, visual, communicative, or environmental limitations, and had only occasional limitations in climbing, balancing, stooping, kneeling, crouching, and crawling. (R. 155-62) In a supplement to the assessment, Dr. Hunter noted Evans was presently tolerating light-duty work, so the assessment was provided for that level of work. (R. 167)

A residual mental functional capacity assessment of Evans was performed by Janet S. McDonough, Ph.D., on July 26, 1995. She found Evans to be moderately limited in the ability to understand, remember, and carry out detailed instructions. She found no significant limitations in any other area. (R. 163-65) Dr. McDonough noted:

[Evans] functions in the borderline to average range of cognitive ability. Reading and language skills are particularly low. He has a 7th grade education, mostly with failing grades per school transcript. He was not in special education. He lives with his parents. He has little restriction in daily activities because of his cognitive functioning. At the present time, he is able to understand, remember and carry out routine, simple tasks and instructions. His ability to manage complex tasks is limited by his general level of cognitive functioning. He can conform to a schedule. He is not particularly distractible. He can relate appropriately, and can cooperate and comply with expectations. He maintains his appearance appropriately. He is able to get about the community independently. He can manage ordinary change and stress in a work setting. He can exercise adequate judgment about ordinary hazards.

(R. 165)

Sue McNeil, Ed.D., performed a psychiatric review technique of Evans on July 26, 1995. (R. 168-76) She found no evidence that Evans suffered from any organic mental disorders; schizophrenic, paranoid or other psychotic disorders; affective disorders, anxiety-related disorders, somatoform disorders, personality disorders, or substance abuse disorders. Dr. McNeil noted Evans exhibited significantly below average general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22), or pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period. Evans exhibited no restrictions of the activities of daily living or maintaining social functioning, and no episodes of "deterioration or decompensation in work or work-like settings which cause [him] to withdraw from that

situation or to experience exacerbation of signs and symptoms." (R. 175) He often exhibited deficiencies of concentration, persistence or pace resulting in a failure to complete tasks in a timely manner (in work setting and elsewhere). (R. 168-76)

On November 30, 1995, Evans was referred by his vocational rehabilitation counselor to Margaret Zander, a Licensed Mental Health Counselor, for an evaluation of suicidal tendencies. Evans had told his counselor that he "might as well use his paycheck to buy a gun and shoot himself." (R. 268) Evans appeared to be severely depressed and quite agitated. He reported feelings of hopelessness, trouble sleeping, and diminished appetite. Evans agreed to voluntary admission to the Cherokee Mental Health Institute. (*Id.*)

Ms. Zander performed a psychiatric impairment evaluation of Evans on November 30, 1995, and found him to exhibit manic symptoms of hyperactivity and depressive symptoms of anhedonia or pervasive loss of interest; appetite disturbance with change in weight; sleep disturbance; psychomotor agitation; decreased energy; feelings of guilt or worthlessness; difficulty concentrating or thinking; thoughts of suicide in the past; and paranoid thinking. Evans exhibited the symptoms of an anxiety-related disorder, including generalized persistent anxiety accompanied by autonomic hyperactivity, apprehensive expectation, vigilance and scanning, and recurrent and intrusive recollections of a traumatic experience causing marked distress. (R. 451) She noted Evans has a "very grave difficulty with lack of confidence in physical and mental tasks," and "severe anxiety." (R. 454)

Ms. Zander found Evans to have a fair ability to understand, remember and carry out complex job instructions; good ability to understand, remember and carry out detailed, but not complex, job instructions; and good ability to understand, remember and carry out simple job instructions. She found Evans to have a good ability to maintain his personal appearance and to relate predictably in social situations, and a fair ability to behave in an emotionally stable manner. Because of the "pain factor," Ms. Zander found Evans would have a poor ability to demonstrate reliability in most work situations. (R. 452)

Ms. Zander found Evans to have a marked impairment of the activities of daily living due to his mental impairments. She opined he would have frequent deficiencies of concentration, persistence or pace, resulting in failure to complete tasks in a timely manner, whether in work settings or elsewhere. She also found he would have repeated episodes of deterioration or decompensation in work or work-like settings which would cause him to withdraw from that situation or to experience exacerbation of signs and symptoms. (R. 453)

As far as Evans's ability to make occupational adjustments, Ms. Zander found Evans to have a good ability to use judgment, and a fair ability to follow work rules and interact with supervisors. He would have poor or no ability to relate to co-workers, deal with the public, deal with work stresses, function independently, and maintain attention or concentration. (*Id.*)

Ms. Zander concluded Evans was not a malingerer, and his combined impairments could reasonably be expected to produce his subjective symptoms and functional limitations. Further, she opined Evans would have significant difficulty maintaining employment due to anticipated absences from work caused by Evans's impairments. (R. 454)

Dr. K.A. McMahon performed an intake evaluation of Evans when Evans entered the Mental Health Institute. (R. 281-83) The doctor made the following diagnosis:

Axis I: Major depression without psychotic features

Axis II: Low average intelligence, reading disability

Axis III: Statues post motor vehicle accident

Axis IV: Psychosocial stressors

Axis V: GAF 51[(9)]

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(R. 282, 283) Dr. McMahon recommended that Evans continue taking Benadryl, Zoloft and Colace, and follow up with outpatient services at Cedar Valley Mental Health Center. (R. 283) Evans told Dr. McMahon that prior to his depression, he had enjoyed many hobbies and was an extroverted person. Evans was willing to be retrained for another job and would like to be able to work full time. (R. 290-92)

On December 4, 1995, James E. Bealer, Ph.D., performed a psychological examination of Evans. (R. 286-87) He summarized his findings as follows:

The patient cooperated on the testing in an appropriate fashion. His SPS suggests that he's on the border between mild and subclinical for a suicide gesture at this time. His Harris Longoes subscales support a very strong concern for physical malfunctioning of his body with many somatic complaints. All of these have a past history of being very real and valid.

In addition, he does feel the world is threatening and that he's misunderstood, has a fear of loosing [sic] his mind, problems concentrating, feels out of control emotionally, and may have laughing or crying spells at times. It further suggests that he may have some bizarre sensory experiences such as hallucinations, unusual thoughts, or peculiar and strange experiences.

(R. 286) Dr. Bealer noted Evans's assets were his attempts to continue working, and his concerned parents. Evans's liabilities were listed as (1) seventh grade education, (2) reading disability, (3) history of multiple injuries and associated pain, and (4) low income. (R. 287)

Evans saw Dr. R.M. Akbar for a follow-up after his discharge from the Mental Health Institute. Evans told Dr. Akbar that his stay at the Mental Health Institute had helped his depression, and he denied sad mood, crying spells, or sleep difficulties. Evans said he was eating and concentrating better, although he still experienced occasional migraines. Dr. Akbar diagnosed Evans with major depression, single episode; borderline intelligence; history of reading disability; status post motor vehicle accident; and history of migraine headaches. He recommended Evans continue taking Zoloft and Diphenhydramine, and discontinue Docusate Sodium, to be resumed if necessary. He also recommended regular mental health visits. (R. 269)

Evans saw Margaret Zander again on February 29, 1996, for a psychiatric impairment evaluation. (R. 270-74) Evans's diagnosis had not changed in the two months since he had seen Dr. Akbar, and Ms. Zander noted Evans's prognosis was "guarded." She opined Evans was "likely to have recurrence of depressive symptoms without medication with continued stress." (R. 271) Ms. Zander reiterated her

findings in an opinion letter dated April 27, 1996 (R. 446-47), in which she stated Evans was likely to have a recurrence of serious psychiatric symptoms if he discontinued anti-depressant medication. She opined Evans's prognosis would be significantly more positive if problems relating to his living situation and work-related issues were resolved. Ms. Zander found Evans's previous employment at All States Quality Foods was a contributing cause of his diagnosis and inpatient treatment at the Mental Health Institute. She recommended Evans continue working with a vocational rehabilitation counselor "to find some activity that he is capable of engaging in, however, this is understandably a difficult situation." (R. 447)

On December 13, 1996, Ms. Zander wrote an opinion letter regarding Evans's ability to work, in which she stated he was presently "unable to maintain employment due to his physical and mental condition." She noted he had been without income for the previous year, and had depended on his parents for support. (R. 456)

Evans returned to see Dr. Nepola on January 13, 1997, complaining of right shoulder pain. The doctor noted Evans continued to have point tenderness over the trapezial muscle, although he had full range of motion without deficits, neurovascular changes, or muscle atrophy. He refilled Evans's prescription and told him to return as needed. (R. 449)

Margaret Zander updated her opinion letter regarding Evans's disability on April 23, 1997. (R. 450) She stated Evans had continued to remain significantly depressed and in relatively severe pain. Evans's condition had deteriorated due to the amount of time that had elapsed since he felt he could maintain employment. Evans was despondent and withdrawn, and had limited hope for the future. He expressed concern that he might become suicidal if conditions did not change for him. (*Id.*)

Ms. Zander wrote an opinion letter dated May 19, 1997, regarding Evans's ability to work. (R. 455) She opined Evans's debilitative mental and physical conditions would make employment extremely difficult. She noted Evans's work restrictions due to physical problems would make finding a job very difficult, as would Evans's learning disability and difficulty reading. She recommended Evans continue to receive food stamps. (*Id.*)

On September 14, 1999, Steven B. Mayhew, Ph.D., performed a psychological evaluation of Evans. (R. 622-24) Evans told Dr. Mayhew he had applied for disability benefits for several years and had been denied benefits. He reported being on five different medications, and said he smoked one-half pack of cigarettes daily, and did not abuse alcohol or illegal drugs. Dr. Mayhew diagnosed Evans with major depression, recurrent (provisional) based upon a review of Evans's medical records and history, along with borderline intellectual functioning and limited educational history. Evans was able to follow instructions and procedures for completing the psychological testing, and related to Dr. Mayhew in a pleasant and cooperative manner. (*Id.*)

Dr. Mayhew found Evans could relate to many coworkers without difficulty, although his ability to deal with the general public was estimated to be fair to poor. Evans's judgment was fair, and he would interact adequately with supervisors. His ability to deal with work stressors appeared to be fair. Evans had unimpaired immediate attention and concentration, and a markedly poor ability to understand, remember, and carry out complex job instructions. Evans would be able to understand and remember simple job instructions and some detail, but not complex instructions. His emotional stability would be variable in light of his depression. Dr. Mayhew noted, "It is of some concern that [Evans] has elected to avoid recommended treatments for his physical conditions in the past. . . . His capacity to manage benefits would appear fair at this time." (*Id.*)

Evans underwent a psychiatric evaluation by Dr. Elaine Nicola on November 10, 1999. (R. 628-31) Dr. Nicola found Evans to be "reasonably reliable and cooperative." (R. 630) After her examination, the doctor diagnosed Evans as follows:

Axis I: Post Major Depressive Episode (296.2) which has evolved into Dysthymia, adult onset

Axis II: Probable Borderline Intellectual Functioning R/O Specific Learning Defects.

Axis III: Congenital Deformities by history, Cleft Palate and extra teeth and physical and injuries and conditions per patient report[.]

Axis IV: Social Phobia (300.23).

(R. 631)

Dr. Nicola noted Evans "worries a lot about finances. He does handle his own checkbook. He has trouble with numerical calculations but he is reliable and has been able to do this successfully. I do recommend that he handle his own finances." (R. 629) She determined Evans's

worry about finances is genuine. He has been able to figure out how working at minimum wage at his slow rate would not involve advancements. He has been associated with voc rehab 2 years ago when he was tested in Des Moines. He tells me that he was recommended for a repetitive motion job. I don't know whether that is accurate or not, but he claims that he felt he could not do that. I think some kind of job that would not involve repetitive motion and that would involve allowing him to work at his own rate in a supportive environment would be realistic options here.

(R. 631) The doctor noted Evans responds reasonably well to structure, and he "would need a job that would allow him to work slowly and where he would get a good deal of support." (R. 630)

The Administrative Appeals Judge considered some additional medical records in connection with Evans's appeal of the denial of benefits by the ALJ. Evans saw Dr. George Bergus at the University of Iowa Family Care Center on August 7, 2000, with complaints of low back pain, neck pain, and headaches. (R. 16-18) Evans's weight was fluctuating, his vision was worsening, he bruised easily, and he reported experiencing heartburn, swelling in his joints, and trouble falling asleep. Dr. Bergus noted Evans met the criteria for depression. He renewed Evans's psychiatric medications because Evans reported he could not afford to see a psychiatrist. The doctor noted Evans had multiple myalgias and arthralgias consistent with myofascial pain in the low back region, as well as the trapezius and posterior cervical region. Evans was advised to avoid over-the-counter nonsteroidal medications and aspirin due

to his history of dyspepsia, for which he was taking Prilosec. He scheduled a follow-up appointment in one month. (*Id.*)

On August 16, 2000, Evans saw Sarah Clarke, a Psychiatric Physician's Assistant at the University of Iowa Hospitals and Clinics, for a psychiatry diagnostic evaluation. (R. 22-24) Ms. Clarke assessed Evans as follows:

Axis I: Major Depressive Disorder, recurrent, in partial remission

Axis II: Borderline Intellectual Functioning, Rule out Dependent Traits

Axis III: Myofascial pain syndrome per patient report; status post repair unilateral cleft lip and palate

Axis IV: Severe; recent death of parent, unemployment, financial stressors, limited social supports, chronic pain

Axis V: GAF = 62.[(10)]

(R. 23-24) Ms. Clarke recommended Evans continue on his current medications and follow up in four weeks. Robert A. Philibert, M.D., Ph.D., "personally interviewed and examined [Evans]," and reviewed Ms. Clarke's findings with her. The doctor agreed with Ms. Clarke's assessment and treatment plan, and recommended a check of Evans's thyroid, to assess for suprathyroid hypothyroidism. He also recommended an EKG "to evaluate for Elavil suitability." (R. 24)

On September 21, 2000, Evans saw Dr. Robert Garrett at the University of Iowa Family Care Center with continued complaints of depression and joint pain. Dr. Garrett noted Evans had cancelled several appointments with Cedar Valley Mental Health because Evans felt "blah." Evans continued to be concerned about his inability to obtain disability benefits. He reported living on his own, with his nephew handling his finances. Dr. Garrett assessed Evans as having chronic depression, stable and unchanged. He refilled Evans's prescriptions for 30 days, and told Evans if he did not keep his mental health appointments, his prescriptions would not be refilled again. He also refilled a prescription for Prilosec for dyspepsia, which was stable and controlled. He told Evans to follow up in three months. (R. 14-15)

On October 16, 2000, Evans underwent a neuropsychological assessment by John D. Bayless, Ph.D., at the University of Iowa College of Medicine. (R. 10-11) Dr. Bayless administered a number of tests, and concluded Evans has a borderline intellectual functioning overall, with an IQ of 75, "within state guidelines for persons with mental deficiency." (R. 11) He found Evans to have "[r]elatively adequate performances in many aspects of nonverbal intellectual abilities," "[i]mpaired memory and cognitive

flexibility," "Mixed Receptive-Expressive Language Disorder, with severe deficits in reading and arithmetic skills," and "Depression, Severe." (*Id.*) Dr. Bayless concluded:

Current findings indicate lifelong severe developmental learning problems complicated by acquired physical limitations. Patients with this cognitive profile are unable to perform jobs requiring lexical and verbal skills, while physical restrictions hamper performance in other jobs; the net result is a marked restriction of available vocational options.

(*Id.*) He noted Evans's was a "somewhat complicated case." (*Id.*)

Also on October 16, 2000, Evans saw rehabilitation therapist J.F. Reynolds for a Functional Capacity Evaluation Summary Report. (R. 12-13) Reynolds found Evans evidenced "at least some degree of symptom magnification"; however, Reynolds clarified this did not imply intent on Evans's part. "Rather, it is simply stated that Mr. Evans can do more at times than he currently states or perceives. While his subjective reports should not be disregarded, they should be considered within the context of symptom magnification findings." (R. 12) Reynolds also found it was unrealistic to compare Evans's abilities with his last job description because it had been so long since Evans last worked. (*Id.*) Reynolds concluded:

Mr. Evans has demonstrated some ability to work today. It would seem that because of his perceptions he would be best suited to bench-type work that does not require much lifting. He should be able to vary his posture frequently. Preferably, the work should not involve much forward reaching or repetition.

Mr. Evans is in poor physical condition and would do better if he participated in a 4-6 week conditioning program. This would be best done once he has identified potential vocational possibilities so that the strength and conditioning can be designed to maximize his ability to perform the job.

(R. 13) Further, Reynolds opined it was "unlikely that any physiotheraputic [sic] modalities would be of any benefit [to Evans] at this time." (*Id.*)

3. Vocational expert's testimony

VE Barbara Laughlin testified at the hearing. The ALJ posed the following hypothetical for the VE's consideration:

I would like you to consider a hypothetical individual who is 44 years old and completed the seventh grade of school. He has been considered a diagnoses of myofacial [sic] pain syndrome (Phonetic) of unclear ideology [sic] with normal EMG studies, yet complaints of pain in the right arm, hand and neck. Such complaints do not seem to have an objective pathology. Testing has not been able to determine the ideology [sic] of the pain. Nevertheless, based on his complaints of pain, he has been given a 20 pound weight limitation but not above the waist and no repetitive motion or use of the right upper extremity. There are no other physical limitations. As to psychological limitations, he has been diagnosed with a

major depressive disorder. At the present time, carries a diagnosis of dysthymia. He also has a prior history of alcohol abuse which at this point is in remission. His ability to make occupational judgements or adjustments in the areas of relating to co-workers, dealing with the public, dealing with work stresses and function independently is described as fair. The definition of fair is ability to function in this area is limited but satisfactory. His ability to follow work rules, use judgement, interact with supervisors, maintain attention and concentration has been described as good. These descriptions have been given by both Dr. Ascheman, a psychologist, and Dr. Mayhew. His ability to make performance adjustments [has] been described as follows. His ability to understand, remember and carry out complex job instructions is poor. And poor is described as ability to function in this area is seriously limited but not precluded. His ability to understand, remember and carry out simple job instructions has been defined as unlimited or very good by both Dr. Ascheman and Dr. Mayhew. In terms of making personal and social adjustments, his ability to maintain personal appearance is fair, behave in an emotionally stable manner is fair, relate predictably in social situations is between good and fair, and Dr. Mayhew could not determine his reliability, but his long work history would suggest that he has the ability to be reliable when employed. His IQ scores - he obtained a verbal IQ score of 74, a performance non-verbal score of 90, and a full-scale IQ score of 81. These scores would correlate with both psychologists' opinion[s] that the claimant could perform simple unskilled work activity at least cognitively. With these restrictions, would he be able to perform any of his past work activity?

(R. 129-30) The VE replied that Evans would be able to perform a job similar to his job as a restroom attendant. (R. 130) The VE explained this is different than a janitor. "The janitor is the cleaner which is at medium level which he would be precluded from. The restroom attendant . . . is a medium level. However, he described it in his work experience as light." (R. 131) Evans could not work as a poultry eviscerator because it requires repetitive motion. (*Id.*)

The VE said there are other types of work Evans could do, within the parameters of the restrictions identified in the ALJ's hypothetical. (*Id.*) All of the jobs are light, unskilled work. The jobs, and the numbers of such jobs available in the local and national economies, include: parking lot attendant, 200 locally, 15,900 nationally; storage facility rental clerk, 200 locally, 10,800 nationally; bottling line attendant, 250 locally, 25,000 nationally; surveillance system monitor, 250 locally, 58,000 nationally; and document preparer, 300 locally, 15,000 nationally. (R. 132)

Evans's attorney asked the VE to consider the following hypothetical:

Assume if you would . . . an individual age 44 who's about 40 pounds overweight who's been diagnosed as having a permanent chronic myofa[s]cial pain syndrome, who's been diagnosed as having a permanent major depression, recurrent, disorder, who is limited to no more - no lifting other than 20 pounds, not [above] the waist with no repetitive motion and no use of the right upper extremity, who cannot do prolonged standing, who . . . must take a break every - for approximately 15 minutes [per] hour even at a sitting job, who has a full-scale IQ of approximately 81, who completed the seventh grade with Ds and Fs at age 16, and whose last past relevant employment was part-time at - as a bathroom attendant in which his major duty was to watch if other people washed their hands. And that was about 20 hours per week. Given that past - that hypothetical and your prior testimony regarding his past relevant employments, could he return to his past relevant employment?

(R. 133) The VE replied, "An individual that needs a 15 minute break every hour that he works, period, is not - that's not conducive to employment in the national economy." (R. 133-34) That requirement would preclude him from any competitive employment. (R. 134)

4. The ALJ's conclusion

The ALJ found that Evans had not engaged in substantial gainful activity since July 1, 1994. (R. 42, ¶ 2) She found Evans to have "severe overuse syndrome of the right arm, major depression, borderline intellectual functioning, and an anxiety-related disorder"; however, she concluded he did not have an impairment or combination of impairments listed in, or medically equal to one listed in, the regulations. (*Id.*, ¶ 3) She found Evans's allegations were not supported by the record and were not credible. (*Id.*, ¶ 4) With regard to Evans's work limitations, the ALJ found as follows:

[Evans] has a 20 pound lifting limitation, is not capable of significant lifting above the waist, and must avoid repetitive use or motion of the right arm. He has good ability to follow work rules, use judgment, interact with supervisors and maintain attention and concentration; and fair ability to relate to co-workers, deal with the public, handle work stress and function independently. He has good fair [sic] ability to understand, remember and carry out detailed but not complex job instructions and unlimited ability to handle simple instructions. He has good ability to relate predictably in social situations and fair ability to maintain personal appearance, behave in an emotionally stable manner and demonstrate reliability (citation omitted).

(R. 43, ¶ 5)

The ALJ held Evans is capable of performing his past relevant work as a restroom attendant. Although Evans's acquired work skills are not transferable to skilled or semi-skilled work functions or other work, the ALJ found he retains the residual functional capacity to perform jobs that exist in significant numbers in the national economy. The ALJ gave examples of parking lot attendant, storage facility rental worker, bottle line worker, surveillance system monitor, and document preparer. (*Id.*, ¶¶ 6, 9 & 10) In addition, while the ALJ noted Evans has a limited education, she found he "functions as an individual with a marginal education." (*Id.*, ¶ 8) Thus, although the ALJ found Evans's "impairments restrict his ability to perform work related activities" (R. 32), she nevertheless found Evans was not under a disability, as defined in the Social Security Act, at any time through May 12, 2000. (R. 43, ¶ 11)

The ALJ noted a decision as to Evans's disability status could not be based solely on work activity or on the medical record, but explained:

After considering [Evans's] remaining capacity for work and the physical and mental demands of work he has previously done, however, the undersigned concludes that [Evans] retains the residual functional capacity to perform past relevant work. Additionally considering [Evans's] residual functional capacity, as well as his age, education, and past work experience, the undersigned also concludes that there are other jobs in the national economy which he can perform, as enumerated by the vocational expert at the hearing.

(R. 31)

The ALJ discounted Evans's testimony that he began to feel throbbing pain after sitting for an hour, noting he was able to sit through the hearing, which lasted an hour-and-a-half, without any apparent discomfort. (R. 33) The ALJ specifically found Evans "exaggerated his complaints. While there are work related restrictions, they are not disabling." (*Id.*) The ALJ "found that the old history of injuries to both [of Evans's] lower extremities has not restricted [Evans's] ability to work since July 1, 1994." (*Id.*) She noted Evans's part-time work as a restroom attendant from July 1994 until November 1995 "suggest[ed] [Evans] did not view his pain as disabling." (R. 35) Further, the fact that Evans refused trigger point injections when they were suggested by his doctors

undercuts his claim that he was experiencing disabling pain even if he avoided repetitive motions with the right upper extremity. The fact that [Evans] has admitted using over-the-counter Tylenol rather than a prescription pain medication also is inconsistent with [Evans's] claim of disabling pain. The absence of prescription pain medication and lack of treatment for a year during claimed disability period tends to indicate tolerable pain.

(*Id.*, citing *Bentley v. Shalala*, 52 F.3d 784 (8th Cir. 1994)) Overall, the ALJ found there were inconsistencies between Evans's subjective pain complaints and other evidence in the record, diminishing Evans's credibility.[(11)] (R. 37)

The ALJ held Evans failed to meet his burden to show he is unable to perform his past relevant work, noting "he must be found 'not disabled' on this basis alone.'" (R. 41) Even if Evans had shown the ability to work, thereby shifting the burden to the Commissioner to determine whether Evans was capable of sustaining substantial gainful activity in other occupations existing in significant numbers in the national economy, the ALJ still would have found Evans was not disabled. (*Id.*)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that

significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id*.; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) ("[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.") (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

In our circuit it is well settled law that once a claimant demonstrates that he or he is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); *accord Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial evidence is "relevant evidence which a reasonable mind would accept as adequate to support the [ALJ's] conclusion." *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; *accord Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its

entirety, taking into account "'whatever in the record fairly detracts from'" the weight of the ALJ's decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *accord Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be "more than an examination of the record for the existence of substantial evidence in support of the Commissioner's decision"; it must "also take into account whatever in the record fairly detracts from the decision." *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does "not reweigh the evidence or review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently," *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski:*

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1) the claimant's daily activities;

2) the duration, frequency and intensity of the pain;

3) precipitating and aggravating factors;

4) dosage, effectiveness and side effects of medication;

5) functional restrictions.

Polaski, 739 F.2d at 1322.

IV. ANALYSIS

As noted previously, Evans claims the ALJ erred in two respects: (1) failing to give sufficient weight to the opinions of Evans's treating physicians, and (2) failing to ask a proper hypothetical question of the Vocational Expert. The court will address each of these claims in turn.

Evans argues the ALJ's decision fails to give appropriate weight to the opinion of his primary treating physician, Dr. Afridi, and fails to consider a neuropsychological assessment of Evans performed by John D. Bayless, Ph.D., on October 16, 2000. (R. 10-11) The Appeals Council considered Dr. Bayless's evaluation and found it did "not provide any basis for changing the [ALJ's] decision." (R. 7) Evans argues Dr. Bayless's evaluation, taken together with records from the University of Iowa Hospitals and Clinics dated September 21, 2000 (*see* R. 14-15), "demonstrates that the chronic depression suffered by Kent Evans is continuing and severely disabling." (Doc. No. 11, pp. 4-5)

Evans argues further that the historical findings and opinions of his treating psychiatrist Dr. Afridi, and mental health counselor Margaret Zander, both of whom have treated Evans for several years, are consistent in their conclusion that Evans is unable to sustain gainful employment. (*Id.*, pp. 5-7)

The Commissioner discredits Ms. Zander's opinion, noting she "was not a medical doctor or doctor of osteopathy and was unqualified to identify work-related restrictions due to physical pain or limitations, she merely accepted [Evans's] complaints as a basis for describing work-related restrictions, and her opinion was inconsistent with other evidence." (Doc. No. 12, p. 14) Although the Commissioner acknowledged Dr. Afridi expressed doubt that Evans would improve sufficiently to be able to sustain employment to support himself, the Commissioner also considered Dr. Afridi's comment that Evans looked better than the doctor had anticipated and he expected Evans to continue to improve. Other physicians indicated Evans would be able to perform a limited range of work.

In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that a treating physician's opinion regarding an applicant's impairment will be granted "controlling weight," provided the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2). Consistent with the regulations, we have stated that a treating physician's opinion is "normally entitled to great weight," *Rankin v. Apfel*, 195 F.3d 427, 430 (8th Cir. 1999), but we have also cautioned that such an opinion "do[es] not automatically control, since the record must be evaluated as a whole." *Bentley v. Shalala*, 52 F.3d 784, 785-86 (8th Cir. 1995). Accordingly, we have upheld an ALJ's decision to discount or even disregard the opinion of a treating physician where other medical assessments "are supported by better or more thorough medical evidence," *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997), or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions, *see Cruze v. Chater*, 85 F.3d 1320, 1324-25 (8th Cir. 1996).

Whether the ALJ grants a treating physician's opinion substantial or little weight, the regulations provide that the ALJ must "always give good reasons" for the particular weight given to a treating physician's evaluation. 20 C.F.R. § 404.1527(d)(2); *see also* SSR 96-2p.

Prosch, 201 F.3d at 1012-13. *Accord Wiekamp v. Apfel*, 116 F. Supp. 2d 1056, 1063-64 (N.D. Iowa 2000) (Bennett, C.J.).

In this case, the ALJ gave her reasons for discounting the opinions of Dr. Afridi and Margaret Zander that Evans would be unable to work to support himself. However, the ALJ did not have the benefit of either Dr. Bayless's evaluation or the later medical records, which were reviewed by the Appeals Council. Under these circumstances, as the Eighth Circuit has explained:

When the Appeals Council has considered new and material evidence and declined review, we must decide whether the ALJ's decision is supported by substantial evidence in the whole record, including the new evidence.

Kitts v. Apfel, 204 F.2d 785, 786 (8th Cir. 2000) (citing *Mackey v. Shalala*, 47 F.3d 951, 953 (8th Cir. 1995)); *accord Gartman v. Apfel*, 220 F.3d 918, 922 (8th Cir. 2000) (citing *Kitts*, *Mackey*). While noting this is a rather "peculiar task for a reviewing court," our Circuit nevertheless has elected to include "such evidence in the substantial evidence equation." *Mackey v. Shalala*, 47 F.3d 951, 953 (8th Cir. 1995). This requires the court "to determine how the ALJ would have weighed the newly submitted evidence if it had been presented at the original hearing." *Jenkins v. Apfel*, 169 F.3d 922, 924 (8th Cir. 1999).

The court finds the weight of the newly submitted evidence, taken together with the record as a whole, supports the conclusion that Evans is disabled and would be unable to sustain gainful employment. Therefore, the ALJ's decision should be reversed and this case remanded for calculation of benefits.

Because the court has found Evans is entitled to benefits on this point, the court need not consider Evans's argument that the ALJ posed an improper hypothetical to the VE. Nevertheless, the court notes for the record its conclusion that the ALJ did, in fact, pose a proper hypothetical question to the VE, based on the evidence before the ALJ at the time of the hearing. The court finds, however, that if the hypothetical had included Evans's chronic depression, as shown by the evidence submitted to the Appeals Council, the VE likely would have opined Evans would be unemployable.

V. CONCLUSION

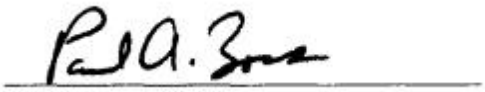
Having found Evans is entitled to benefits, the court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d

at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); *accord Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). Consequently, it is recommended that the court reverse the ALJ's decision and remand this case to the Commissioner for an award of benefits in the appropriate amount.

IT IS RECOMMENDED, unless any party files objections(12) to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of Evans(13) and against the Commissioner, and that this case be **reversed and remanded** to the Commissioner for the calculation and award of benefits.

IT IS SO ORDERED.

DATED this 9th day of January, 2002.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

1. This action originally named Kenneth S. Apfel as defendant. On November 14, 2001, Jo Anne B. Barnhart was sworn in as Commissioner of Social Security, and she is therefore substituted as the defendant in this action. *See* Fed. R. Civ. P. 25(d)(1); *cf.* Fed. R. App. P. 43(c)(2).

2. At the hearing after remand, the ALJ stated "for some reason, the District Court couldn't get the tape to work so they remanded this case back citing an inaudible tape." (R. 88) It is not the court's responsibility to "get the tape to work"; the Commissioner's motion (Doc. No. 5) requested remand because the tape from the June 1996 hearing was inaudible, and that motion was granted by the court.

3. References in this opinion to "the hearing" will be to the hearing after remand, which was held on February 23, 2000.

4. Evans was unsure of how far he had gone in school because he was "held back so many times." (R. 90) He quit school when he was sixteen years old. (*Id.*)

5. The record indicates the accident actually was in August 1987, rather than 1988. (R. 228)

6. Two copies of this progress note appear in the record.

7. Evans lists his disability onset date as July 1, 1994, shortly after this appointment with Dr. Bremner. (R. 143-45, 152)

8. Two copies of this progress note appear in the record.

9. "The GAF score represents Axis V of the Multiaxial Assessment system. *See* American Psychiatric Assoc., *Diagnostic and Statistical Manual of Mental Disorders* 25- 30 (4th ed. 1994). The axial system of evaluation enables the clinician to comprehensively and systematically evaluate a client. *See id.* at 25. The GAF rates the client's 'psychological, social, and occupational functioning.' *Id.* at 30. The GAF is not an absolute determiner of ability to work." *Stalvey v. Apfel*, 1999 W.L. 626133 (10th Cir. 1998).

A GAF of 51-60 indicates "moderate symptoms (*e.g.*, flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (*e.g.*, few friends, conflicts with peers or co-workers)." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed. 1994).

10. A GAF of 61-70 "indicates mild symptoms or some difficulty in social, occupational, or school functioning." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed. 1994)..

11. Evans specifically disputes this claim, arguing his medical history, "when read in context, is consistent with regard to [Evans's] worsening physical pain over the years of employment and after sustaining multiple physical injuries." (Doc. No. 11, p. 2) He claims the ALJ "has misconstrued statements . . . and taken medical references out of context [and] [t]he denial of social security disability benefits to Kent Evans is incompatible with the record and not supported by substantial evidence. (*Id.*)

12. Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

13. If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.